No. 3579.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles L. Williams,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

J. Robert O'Connor,
United States Attorney;
Wm. Fleet Palmer,
Special Assistant United States Attorney.

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The court having granted leave, defendant in error submits the following:

1. The withdrawal of appellant's third ground of motion to quash, referred to on page 7 of defendant in error's brief, will be found in Trans. Vol. II, p. 304.

2. The citation on page 7 of our brief, "Agnew v. U. S., 165, 36" should be 165 U. S. 36.

3. The reference on page 7 of our brief to "section 277 of the Revised Statutes of the United States" should be section 277 of the Federal Judicial Code.

4. The testimony of Charles N. Williams, clerk of the District Court, showing the entire regularity of the

drawing and organization of the grand jury is contained in Trans. Vol. II, page 712 *et seq.*

The statement of Judge Bledsoe in regard to drawing of juries is set out in Tr. Vol. II, p. 713.

Section 276 of the Federal Judicial Code, as amended February 3, 1917, provides that the clerk, or his deputy, and jury commissioner shall place names of qualified persons in the jury box. Their duty in this regard is fixed by the statute, not by an order of court.

United States v. Murphy, 224 Fed. 554, 564;
Dunn v. U. S., 238 Fed. 508, 510;
Apgar v. U. S., 255 Fed. 16, 17 *et seq.;*
U. S. v. Caplis, 257 Fed. 840, 841.

5. To the point that the intent to deceive an agent appointed to examine the affairs of the bank is an offense under section 5209 R. S., add to the authorities cited in our brief, page 22, the following:

Billingsley v. U. S., 178 Fed. 653, 658;
U. S. v. Norton, 188 Fed. 256;
Richardson v. U. S., 181 Fed. 1;
Grant v. U. S., 268 Fed. 443, 445.

6. Plaintiff in error's brief, p. 27, line 23, to p. 28, line 33, relates to testimony of Charles K. Voorhees and was addressed to counts 2 and 3 of the indictment charging misapplication. The jury disagreed on these counts, there is no appeal pending as to them, and consequently there can be no prejudicial error. [Tr. Vol. I, pp. 227 to 229.]

7. Appellant's brief (p. 29, l. 1 to p. 32, l. 6) refers to rulings upon evidence addressed solely to counts 9, 10, 12, 13 and 14, the De Nelson Smith transaction. The jury disagreed as to each of these. No prejudicial error. [Tr. Vol. I, pp. 239 to 254.]

8. Appellant's brief, p. 32, ll. 8 to 20, concerns a memorandum charge of the bank showing that the bank paid to Russell Williams the $5000 charged to have been embezzled by appellant in counts 34 ($2000) and 35 ($3000). The court correctly limited the testimony's effect to showing that the bank paid the money, —the depletion of the bank's funds. [U. S. Ex. 88, Tr. Vol. I, pp. 273-4.]

9. Appellant's brief, p. 32, ll. 23 to 29, this evidence was properly admitted to prove the depletion of the bank's earnings account. [Tr. Vol. I, pp. 274-5.]

10. Appellant's brief, p. 32, l. 32 to p. 33, l. 2, was properly admitted to supplement the testimony which showed that appellant had deposited the Russell Williams checks for $2000 and $3000, respectively, in his own private account. [Tr. Vol. I, pp. 274 to 276.]

11. Appellant's brief, p. 33, ll. 5 to 16, this was proper redirect examination to the cunning cross-examination of Russell Easom, which consisted in asking the witness whether he could tell, from the deposit ticket *alone,* or from the check *alone,* or from his teller sheets *alone,* or from William's account *alone,* etc., whether or not the Russell Williams check for $2000 had been deposited in appellant's private account. This

character of cross-examination was intended, evidently, to lay the foundation for a doubt in friendly minds, and the redirect was to develop the fact that no such suggested doubt could be a reasonable doubt. [Tr. Vol. I, p. 288.]

12. Appellant's brief, p. 33, l. 19 to p. 34, l. 22, is addressed to a reading of a portion of appellant's testimony given in his own behalf at a former trial of the same indictment. [Tr. Vol. I, pp. 320 to 322.] This testimony set out in the brief was regarding the "Von Tesmar transaction." This transaction was involved in counts 27, 28, 29 and 30 of the indictment. The jury disagreed as to each of these counts. Therefore the error, if any, was not prejudicial. But the admission of the testimony of a defendant given by him in his own behalf in a former trial is not error. It is proper evidence.

Wharton's Crim. Ev. § 664;

16 C. J. p. 569, § 1106, and p. 630, §§ 1250, 1251, 1252, 1253;

Powers v. U. S., 223 U. S. 303, 311, 56 L. Ed. 452.

13. Appellant's brief, p. 34, l. 25 to p. 35, l. 6, was in relation to count 22, the Agnes Gillen transaction. In this there was conviction. [Tr. Vol. I, pp. 320, 322.]

Agnes Gillen had an account at the bank in which there was more than $14,000. The balance had been more than $10,000 for many years. She had a special contract with appellant for a high rate of interest to

be paid to her upon this balance by the bank. Ten thousand dollars of this amount was withdrawn from this account without the knowledge or consent of Mrs. Gillen. The bank's books showed this account with the $10,000 out. But the pass book of Mrs. Gillen was balanced by appellant every time but once, after the withdrawal of the $10,000, and the balance set down in his own hand and each of these balances showed the $10,000 remaining in her account. One time the account was balanced by Mrs. Johnston O. Miller, an employee, and the correct balance was set down in the pass book as it appeared on the bank's ledger, showing $804.21. But before the pass book was delivered to Mrs. Gillen the figures 10 were set before this balance, making the pass book show the balance as $10,804.21. The 10 looked like the figures of appellant. On the ledger sheet containing the account of Mrs. Gillen there was twpewritten in red ink the following: "If this acct. goes over, pay all checks and DO NOT notify. C. L. Williams, V. P. 4/21/15." But because the government was unable to produce a witness who could testify that these words were placed there at a time when appellant was connected with the bank the court struck out those words and directed the jury not to consider them. $9000 was drawn out of this account Dec. 18, 1914, and $1000 Feb. 26, 1915. Appellant wrote Joseph W. Sefton, after he retired from the bank and while trying to settle up his affairs, as follows:

"Joe:

If they have credited my special a/c with the funds just charge it with $10,000 & credit to a/c of Mrs.

Gillen & that will settle with her. I have note in my possession payable to her. * * *." (U. S. Exhibit 18.)

And appellant placed an item of "Gillen 10,000" among his liabilities in U. S. Ex. No. 21. [Tr. Vol. V., p. 1503.]

Mrs. Gillen never authorized appellant to make any loan for her, or to invest in any note, or to withdraw any sum whatever from her account. The testimony of Mrs. Gillen of which complaint is here made was proper to show that her pass book was not delivered to her with the balance showing $804.21, and that there was a controversy as to her account, or a discrepancy. The court specially limited this testimony to the single point of showing the existence of the controversy. [Tr. Vol. . . ., p. . . ., l. . . .]

The bank was compelled to repay this $10,000 to Mrs. Gillen. Appellant never produced the note spoken of in the above letter.

There was no error in the court's ruling.

14. Appellant's brief, p. 35, l. 9 to p. 36, l. 23, was as to testimony of another offense to go to the question of intent only, and the court specially limited its effect to that purpose. The evidence showed that the bank's cash reserve was below the legal requirements, and that only July 28, 1914, the bank promised to make good the deficiency. (U. S. Exhibit No. 206.) That a call from the comptroller for the bank's condition on October 31, 1914, was made and became known to the bank

November 4, 1914. That on the day that the call became known, Nov. 4, 1914, appellant made out a deposit ticket for $40,000 in the name of J. W. Sefton, Jr., dated it October 31, 1914, and caused the bank's books to be erased and altered so as to show $40,000 more cash on hand as of October 31, 1914, and this false deposit and entry was carried into the bank's report. November 11, 1914, appellant drew a check in Sefton's name for the $40,000 and closed this account. (U. S. Ex. No. 139.) Mr. Sefton knew nothing whatever of this transaction, never deposited or drew out any of this money, or authorized appellant to do any business for him, or in his name, nor to sign his name to any check. [Tr. Vol. . . ., p. . . . .]

Such testimony is admissible to show intent.

16 C. J., p. 589, § 1137;
Schultz v. U. S., 200 Fed. 234, 236;
Moffatt v. U. S., 232 Fed. 522, 533.

15. Appellant's brief, p. 37, ll. 11 to 24, refers to the Gillen matter (No. 13 *supra*). It merely proved that the bank's books showed the withdrawal of the $10,000 from the Gillen account. This was, of course, perfectly competent and relevant to prove that the report based upon the bank's books showed $10,000 less than the true sum. [Tr. Vol. II, p. 443.]

16. Appellant's brief, p. 38, ll. 28 to 33, objects to a portion of the instructions. The instruction relates to the enforcement of law and is entirely proper.

And p. 39, ll. 2 to 7, was merely to leave the jury free to consider the guilt or innocence of the defendant rather than the punishment he might receive if found guilty. This was proper.

17. Appellant's brief, p. 40, ll. 20 to 23, objects to an instruction that the jury is to decide upon the "strong probabilities of the case, but to justify a conviction the probabilities must be so strong as not to exclude all doubt or possibility thereof, but as to exclude reasonable doubt. As long as you have a reasonable doubt of the defendant's guilt, you may not find him guiltv." This language was approved in

Dunbar v. U. S., 156 U. S. 185, 199, 39 L. ed. 390;
Bacon v. U. S., 97 Fed. 35, 44;
Ammerman v. U. S., 262 Fed. 125;
Wilson v. U. S., 232 U. S. 570.

18. We cite authorities in support of No. 6 p. 31 of our brief as follows:

U. S. v. Harper, 33 Fed. 471, 476;
Phillips v. U. S., 201 Fed. 259, 262;
G. R. & I. Ry. Co. v. U. S., 212 U. S., 577, 582;
Daniels v. U. S., 196 Fed. 459, 464;
Wharton Crim. Ev. (9th ed.) Sec. 126.

19. Additional authorities to No. 10, p. 31 of our brief, that person intends necessary and natural consequences of his acts.

Allen v. U. S., 164 U. S. 492, 496, 41 L. ed. 528;
Kirchner v. U. S., 255 Fed. 301, 305.

20. We cite in support of No. 15, p. 34 of our brief, the following:

> "It cannot be the law that officers of a bank may make a sham entry with the intent to deceive, and yet, merely because they go through the idle and deceitful form of making a transaction to which the entry might nominally but cannot really relate, protect themselves from the consequences of their real conduct. Such a holding would facilitate the vicious practice condemned by the law."
>
> Billingsley v. U. S., 178 Fed. 653, 663;
>
> Hayes v. U. S., 169 Fed. 101.

21. We cite in further support of No. 3, p. 35 of our brief, commenting on failure of defendant, who took the witness stand in his own behalf, to testify fully.

> Le More v. U. S., 253 Fed. 887, 897.

21½. In support of No. 4, p. 36 of our brief, we cite:

> Gilmore v. U. S., 268 Fed. 719, 721.

22. Appellant's brief, p. 64, l. 1 to p. 66, l. 22; we cite additional authority to support No. 6, p. 37 of our brief:

> "The denial of a motion for new trial in the federal courts is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the judgment, as in this case, a motion is not reviewable on a writ of error."
>
> C. M. & St. P. Ry. Co. v. Chamberlain, 253 Fed. 429, 431.

In the case of Mattox v. U. S., 146 U. S. 140, 152, 36 L. ed. 917, 921, the error was in refusing to receive and consider defendant's affidavits,—in refusing to exercise the discretion vested in the court by law.

In Holmgren v. U. S., 217 U. S. 509, 522, 54 L. ed. 861, 867, the indictment was allowed to be taken to the jury room with an indorsement that defendant had been convicted on one of the counts. The court held that the record contained all the evidence and was ample to sustain the conviction of defendant without giving effect to the indorsement on the indictment and new trial was refused. The court below had considered the matter and exercised its discretion.

In Chambers v. U. S., 237 Fed. 513, 520, the custodian of the jury talked with the jury about what punishment the court would probably inflict if a verdict of guilty was returned. The court considered the matter and decided that defendant was not prejudiced. This was held to be an exercise of the discretion vested in the court, and, it was upheld.

The affidavits of appellant show only that one of the custodians talked to members of the jury while eating. This is no showing of prejudice. No attempt is made to show what was said. Under section 269 of the Federal Judicial Code as amended Feb. 26, 1919, it was appellant's duty to show prejudice. In this he failed, and the court below ruled correctly.

23. Appellant claims to set out certain facts proved by the *undisputed* evidence in regard to the Murphy transaction in brief, p. 66, l. 27 to p. 70, l. 31.

The true record of these transactions will be found in the transcript. The testimony shows:

a. Williams was vice president and manager of the bank, The American National. [Tr. Vol. . . ., p. . . . .]

b. M. B. Murphy became acquainted with him and trusted him. [Tr. Vol. . . ., p. . . .]

c. Murphy was sick and unable to attend to business. [Tr. Vol. . . ., p. . . .]

d. Murphy sent his daughter Anna to Williams to open a savings account to be formed from Murphy's checking account already in the bank and a check for $3500. [Tr. Vol. . . ., p. . . . .]

e. Williams wrote, at Anna's request, a check on the checking account for $23,000, May 5, 1916 (U. S. Ex. 6.) and received this check and the $3500 check, a total of $26,500. Williams made out a pass book to M. B. Murphy, time account No. 1436 (U. S. Ex. 5) for the $26,500, and delivered it to Anna for her father. At the same time he made out a deposit ticket for $6500 (U. S. Ex. 7) and caused that to be entered on the bank's books as Time Account No. 1436 (U. S. Ex. 8) in Murphy's name. [Tr. Vol. . . ., p. . . .]

f. On the same day (May 5, '16) Williams caused a note for $20,000 signed by M. D. Goodbody, to be entered on the bank's collection register as the property of M. B. Murphy (U. S. Ex. 14). This note (U. S. Ex. 13) was dated July 1, 1915, due four months after date, made to American National Bank of San Diego, signed by M. D. Goodbody, with seven per cent interest,

and indorsed "Without recourse, American National Bank, San Diego." It was seven months overdue at the time Williams "made a loan" for Mr. Murphy. Goodbody then owed the bank nearly $100,000. He was insolvent and Williams was conducting the financial end of Goodbody's business, and was of course, familiar with his insolvency. [Tr. Vol. . . ., p. . . .]

g. The evidence is that the $20,000 Goodbody note never was listed as one of the bills receivable of the American National Bank. [Tr. Vol. . . ., p. . . .]

h. Williams says it was carried as a "cash item" but there is no book, nor paper, nor witness to sustain that. [Tr. Vol. . . ., p. . . .]

i. Williams now claims he took the Goodbody $20,000 note out of cash items and put $20,000 of Murphy's money into the bank in its place. But there is no witness, nor book, nor record, nor paper to support that claim. On the other hand, Williams acknowledged to F. J. Belcher that he told Murphy he would put the $20,000 back into Murphy's account and had not done so because he never had had the money to do it with. Williams made several statements of his assets and liabilities at the time of his withdrawal from the bank, and in each he included the $20,000 Murphy item as a personal liability. (See U. S. Exs. 20, 21, 22,) [Tr. Vol. . . ., p. . . .]

j. The consolidated bank under the name of First National Bank of San Diego was compelled to pay and did pay this $20,000 to Mr. Murphy. [Tr. Vol. . . ., p. . . .]

k. Williams drew checks against Goodbody's account at the rate of four per cent. The note called for interest at seven per cent. [Tr. Vol. . . ., p. . . .]

l. Williams instructed H. J. Ingram, bookkeeper of the bank, that if any checks came in on the Murphy account to see Williams first, before turning them down for want of funds. [Tr. Vol. . . ., p. . . .]

Mr. Williams never asked Murphy about the loan until six months after it was made. Murphy told him to put the money back in his account, and Williams promised to do so, but never did, because, as he told Mr. Belcher, he never had the money to put back. [Tr. Vol. . . ., p. . . .]

This evidence is so overwhelming—tracing the $20,000 to the personal possession of Williams; showing the false entries in the books; the attempt to guard against discovery by instructions to the bookkeeper; the attempt to palm off on the aged and sick Mr. Murphy a worthless note, possibly hoping he would die and afford Williams a means of escape; the promise to Murphy to replace the money and the failure so to do, the acknowledgment in three different papers that he owed Murphy this money—that it is really inconceivable how counsel can claim there is nothing in the record to warrant a conviction of embezzlement. The fact is demonstrated in writing, and the writing is made by the defendant's own hand.

24. Appellan't brief, p. 70, l. 27 to p. 71, l. 16, deals with count 22, which charged a false entry in a report

to the comptroller, the said report reflecting the false entry of $10,000 less under the head "Individual Deposits ,subject to check," in the column devoted to liabilities, being item number 33 of the report made May 13th, 1916, of the condition of the bank May 1, 1916, than was the true amount because defendant had unlawfully withdrawn $10,000 from the account of Agnes Gillen. (See No. 13 *supra.*)

It is objected that there is a variance between the allegation and the proof.

Count 22, after alleging certain formal matters charges:

"That said Banking Association on the 13th day of May, 1916, then and there made and transmitted to the then comptroller of the currency of the United States a certain report of the condition of the said Banking Association at the close of business on the 1st day of May, 1916, according to a certain form theretofore prescribed by the comptroller of the currency of the United States for the time being, the same being a report which was then and there, to-wit: on the said first day of May, 1916, and said 13th day of May, 1916, by law the duty of the said Banking Association to make and transmit to the said comptroller and which said report was then and there verified by the oath of the said association and attested by the signature of three of the then directors thereof, of which three attesting directors the said Charles L. Williams was one.

"And the grand jurors aforesaid upon their oath aforesaid do further present that the said Charles L. Williams, being director, agent and so being also such vice-president of the said Banking Association on the

said 13th day of May, 1916, within the city of San Diego, county, state, district and division aforesaid, unlawfully did knowingly and feloniously make and cause to be made a certain false entry in the said report so made as aforesaid, under the head of 'Individual Deposits, subject to check,' in the column devoted to liabilities, being item number 33 of said report, as follows, 1,509,993.19, that is to say, a false entry to the effect that at the close of business on the said 1st day of March, 1916, the said Banking Association's liability on individual deposits subject to check was $1,509,-993.19, whereas in truth and in fact ,as he, the said Charles L. Williams at the time of so making and causing to be made the said false entry well knew the liability of the said Banking Association on individual deposits subject to check on the first day of May, 1916, was $10,000.00 greater than the said sum of $1,509,-993.19, as he, the said Charles L. Williams then and there well knew, and the said Charles L. Williams at the time he so made and caused to be made the aforesaid false entry did so with the intent then and there to deceive any agent of the comptroller of the currency appointed to examine the affairs of said banking association." [Tr. Vol. I, pp. 47 to 49.]

The report introduced to support this charge (U. S. Ex. 66) a photostatic copy of which was filed with the clerk on the day of argument by leave of court, fulfilled all of the allegations with reference thereto except that it was not signed by Charles L. Williams. The allegation that it was so signed is mere surplusage and may be disregarded. It need not be proved.

Wharton Crim. Pleading and Practice (9th ed.) Sec. 180;

Wharton Crim. Ev. (9th ed.) Sec. 138.

It is not made an offense under section 5209 R. S., or under the banking laws to falsely attest or verify a report; the offense consists in making or causing to be made a false entry therein. The offense charged against Williams is making and causing to be made the false entry in a report of May 13, 1916. The offense is minutely charged and the proof sustains the allegations. There is no variance.

Cochran v. U. S., 157 U. S. 286, 292, 39 L. ed. 704, 706;

U. S. v. Herrig, 204 Fed. 124, 125.

> "Defendant contends that there is no evidence showing that he personally directed the repetition of these false entries. * * * The original entries were of such a character and made for such a purpose that an inference is reasonable, if not quite irresistible, that their subsequent repetitions was for the sole purpose of carrying out the original design to deceive. There is in our opinion substantial evidence that defendant knew and intended that his subordinates would continue to make the false entries which he had originally authorized until he should give directions to the contrary. The question of the authorship or responsibility for the repeated entries was fairly left to the jury, and its affirmative finding on that issue we think is supported by substantial proof."
>
> Billingsley v. U. S., 178 Fed. 653, 662.

Defendant was held guilty of causing false entry where he made a false deposit slip from which other employees made the false entry in the case of

Agnew v. U. S., 165 U. S. 36, 41 L. ed. 624.

25. Appellant's brief, p. 71, l. 17 to p. 72, l. 18, is based upon a misconception. It is not alleged in count 31 that the notes were misapplied with the sole intent to injure *only,* nor in count 33 with the sole intent to deceive *only*. It is easily conceivable that a man might, by misapplying notes, intend to defraud, to deceive and to injure. The matter of the knowledge or consent of the bank is fully treated in our brief, page 12, No. 2.

26. Appellant's brief, p. 72, l. 19 to p. 73, l. 23, refers to the two Russell Williams transactions involved in counts 34 and 35, and upon which conviction was had.

The testimony regarding these transactions was to this effect:

Russell Williams went to appellant December 18, 1917, to get an investment for $2000. He delivered to appellant his check for $2000, payable to the American National Bank. (U. S. Ex. 83.) Appellant endorsed the check and deposited it in his personal account. He also gave Russell Williams a receipt for a "note of R. P. Shields, dated December 1st, 1917, for $2000" etc. (U. S. Ex. 84). No trace of such a note could be found. Appellant made out a deposit slip for the $2000 for his own account Dec. 18, 1917 (U. S. Ex. 90). At the time this deposit was made appellant's account was overdrawn $939.62. The amount so deposited was checked out in small amounts until on the 28th of December, 1917, the account was again overdrawn $102.70. This transaction is the one charged in count 34.

On January 11, 1918, the American National and First National Bank of San Diego having been consolidated in the meantime and appellant made president of the new bank, Russell Williams returned to appellant and arranged for an investment of $3000 additional. He made out his check payable to the First National Bank and delivered it to appellant (U. S. Ex. 85). The check was perforated as paid, but it was not endorsed. Appellant executed a receipt to Russell Williams as follows: "San Diego, Cal., January 11, 1918. Received of Russell Williams $3000 for investment at 7% per annum from this date. C. L. Williams." (U. S. Ex. 86.) Appellant told Russell Williams he would invest the $3000 in a Shields note the same as the $2000 note, that is two notes, one for $2000 and one for $3000, On January 11, 1918, appellant deposited the $3000 Russell Williams check in his personal account, making out the deposit slip with his own hand. (U. S. Ex. 91.) Before and at the time of this deposit appellant's account had a balance of but $262.85. The account as augmented by the Russell Williams $3000 was paid out on small checks until on January 21st, 1918, there remained but $141.54.

In appellant's statement of liabilities and assets (U. S. Ex. No. 21) he placed an item of $5000 due Russell Williams. [See Tr. Vol. . . ., p. . . .]

There were other evasions and deceits of appellant in this matter, but the testimony was so strong as to be a practical mathematical demonstration of the embezzlement of these two sums by appellant.

The First National Bank had to and did pay this $5000 to Russell Williams. [Tr. Vol. . . ., p. . . .]

27. We desire to cite the following in addition to No. 7, page 38 of our brief:

"There was no demurrer to the evidence, nor request for an instructed verdict. In the absence of apparent injustice court will not consider insufficiency of the evidence."

Holland v. U. S., 268 Fed. 244, 245;
Sturtz v. U. S., 268 Fed. 350, 351;
Ramsey v. U. S., 268 Fed. 825, 826.

28. "Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded."

Williams v. U. S., 265 Fed. 625;
Smith v. U. S., 267 Fed. 665, 670.

29. We cite, in addition to authorities under the first paragraph of "Conclusion," page 39, the following:

Abrams v. U. S., 250 U. S. 616, 619;
Grant v. U. S., 268 Fed. 443, 444.

30. We cite, under No. 1, p. 11, at page 23, the following:

Billingsley v. U. S., 178 Fed. 653, 658;
U. S. v. Norton, 188 Fed. 256;
Richardson v. U. S., 181 Fed. 1;

Grant v. U. S., 268 Fed. 443, 445;
U. S. v. Mulligan, 268 Fed. 893, 897.

31. It was claimed in argument of counsel that the indictment was defective because it was not alleged that the bank was a "Federal Reserve Bank" or a "Member Bank" as provided in the amendment of section 5209, Sept. 26, 1918, 40 Stat., c. 177, Sec. 7, 1919 Sup. Comp. Stat. Sec. 9772. When the offenses were committed this amendment had not been adopted. The last offense charged is of January 11, 1918, count 35. The amendatory act reads that this section and 5208 "be and the same are hereby amended and *reenacted* to read as follows:"

This matter is fully disposed of by section 13 of the Revised Statutes of the United States, which is a general saving clause, and reads as follows:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability, incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001;
Goublin v. U. S., 261 Fed. 5.

The amendatory act contains no repealing clause whatever. In addition to this, the "member banks" are

yet known as national banks and are organized under and by virtue of the "National Bank Act" which is a law of the United States as alleged in the indictment.

See:

Comp. Stat., Secs. 9657 *et seq.*

Wm. Shapespeare has truly said:

"What's in a name?

"That which we call a rose, by any other name would smell as sweet." (Romeo and Juliet.)

Inasmuch as there has been no change in the organization of the banking association, and no change in its name, and its present name is now the same as that alleged in the indictment; and the banking association known as a national bank has become and is a "member bank" as was proven on the trial, there is nothing whatever to base the objection on. In other words, the description of the banking association as contained in the indictment, fits in every way the "member bank" described in the amended and re-enacted section 5209, as also the section before the amendment was made, and appellant could not be misled or prejudiced by such allegations.

32. We have been unable to secure a copy of the transcript in this case, or to have access to a copy for purposes of citation, and consequently cannot cite the transcript in support of our brief. At the time of the argument we got a few references on points argued by appellant and those we cite. We have attempted to

direct the attention of the court to the record by giving the number of the exhibits referred to, and we have cited appellant's brief so that the court may know to what point our argument is directed.

Conclusion.

The testimony in this case shows beyond doubt that the conviction of appellant was well merited. It is evident that he was not misled as to the issue because of any defect in the indictment. This was the second trial of the indictment and the evidence was the same in each case as to those counts upon which the government went to trial. There is no doubt that the indictment sufficiently describes the offenses to enable appellant to plead former jeopardy if he should be indicted for the same matters. There is no showing and no claim that appellant was prejudiced by any claimed defect in the indictment. Therefore the indictment is sufficient under section 1025 Revised Statutes.

U. S. v. Mulligan, 268 Fed. 893, 897.

February 26, 1919, Congress amended section 269 of the Federal Judicial Code (40 Stat. at Large, pt. 1, p. 1181, Comp. St. Ann. Supp. 1919, Sec. 1246) by adding the following:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before

> the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In the celebrated case of Haywood v. U. S., 268 Fed. 795, 798, the Circuit Court of Appeals for the Seventh Circuit held, in referring to this amendment:

> "From this legislation we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

In the light of this amendment the unsubstantial structure of technicalities and quibblings erected in appellant's brief melts away like the frost picture on the window pane melts in the warm rays of the morning sun. The record does not disclose any substantial error. The trial was eminently fair and impartial. Defendant had every opportunity to show his innocence. He began in the bank when a boy, as janitor. He rose from messenger to bookkeeper, to teller, to assistant cashier, to cashier and manager, to vice-president and to president. He was thoroughly familiar with all the "ins and outs" of the business. He had access to the books. The government employees assisted him in ferreting out whatever he requested. His

treatment by court and prosecution was most considerate. There is no error pointed out, which, when you examine the overwhelming evidence of guilt, can be said to have prejudiced appellant in his defense.

The judgment should be affirmed.

Respectfully submitted,

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Wm. Fleet Palmer,

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